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No. 82-192

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

DELTA AIRLINES, INC.,
Petitioner,

vs.

MARGARET THORNBERRY, PATRICIA FARMER, DELORES O'SULLIVAN and LINDA NAGEL, on behalf of themselves and all others similiarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an award of attorney's fees made pursuant to a settlement for all time reasonably spent on a case brought under Title VII of the Civil Rights Act of 1964 properly reflects the extent to which plaintiff prevailed.

2. Whether expenses for experts and consultants, and other litigation costs not included as taxable costs under 28 U.S.C. § 1920 may be awarded as "costs" under Section 706(k) of Title VII of the Civil Rights Act of 1964.

PARTIES

The parties to the proceedings below were 1) the individual plaintiffs, Margaret Thornberry, Patricia Farmer, Dolores O'Sullivan, and Linda Magel; 2) a class of all women employed by Delta Air Lines, Inc. in its Marketing and Traffic Departments nationwide; and 3) defendant Delta Air Lines, Inc. The attorney's fee and costs award involved in this petition was made to plaintiffs' counsel Carroll, Burdick & McDonough and Gerald E. Magaro.

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No. 82-192

IN THE SUPREME COURT

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UNITED STATES

October Term 1982

Delta Airlines, Inc.,
Petitioner,
vs.
Margaret Thornberry, Patricia Farmer,
Dolores O'Sullivan and Linda Magel,
on behalf of themselves and
all others similarly situated,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents respectfully request that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on May 5, 1982, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, as corrected and modified, is officially reported at 676 F.2d 1240. The court's May 13, 1982 opinion, and its orders of June 4, 1982, and July 14, 1982, modifying and amending the opinion, are included in the appendix of the petition as Appendix A, as is the Court of Appeals' order of June 17, 1982 denying Delta's petition for rehearing and suggestion for a rehearing en banc.

The opinion of the district court awarding attorney's fees and costs is not officially reported. It is unofficially reported at 25 EPD ¶ 31,496, and is attached as Appendix B to the petition.

Other opinions which may be relevant to the petition are attached as appendices to the petition. The order of the district court approving the parties' settle-

ment agreement in the underlying action and a copy of the settlement agreement are attached to the petition as Appendix C. The district court's opinion and order regarding class certification is unofficially reported at 16 EPD ¶ 8294 and is attached to the petition as Appendix E. The memorandum and order of the district court on petitioner's motion to dismiss and transfer venue is unofficially reported at 27 FEP Cases 1203 and 13 EPD ¶ 11,513 and is attached to the petition as Appendix F.

JURISDICTION

The jurisdiction of the district court originally was invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3), and under the Equal Pay Act of 1963, 29 U.S.C. § 216(b). However, in its class certification order, the district court dismissed claims

brought under the Equal Pay Act and jurisdiction was thereafter invoked only under Title VII. (See Petitioner's Appendix E at A-57, n.1)

Petitioner invokes jurisdiction of this court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The attorney's fee provisions of Title VII of the Civil Rights Act of 1964 are contained in § 706(k) of the Act, 42 U.S.C. § 2000e-5(k), which provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The federal courts are authorized to tax costs under 28 U.S.C. § 1920 which provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshall;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

This petition is taken from a decision of the Ninth Circuit Court of Appeals

upholding an attorney's fees award made to plaintiffs' counsel in a Title VII employment discrimination action. Plaintiffs represented a nationwide class of approximately 8,700 present and former female employees in the Marketing and Traffic Departments of Delta Airlines, the Petitioner.

On March 31, 1980, the District Court gave final approval to a Settlement Agreement which was reached after several months of negotiations. The Settlement included, inter alia, the following terms: a claims procedure to provide all 8,700 class members an opportunity to file claims for open-ended relief from any sex discrimination committed by Delta; a decentralized complaint process within Delta's employment structure to deal with any sex discrimination complaints of employees which might arise in the future; changes in the job description information

for the Customer Service Agent position to enhance transfer and promotional opportunities for female employees into airport positions; a job posting system to announce vacancies for supervisory positions in the Traffic (Reservations) Department; and a monetary settlement of the claims of the four named plaintiffs. The Agreement also provided for payment of plaintiffs' attorney's fees incurred in the handling of the claims filed pursuant to the claims procedure. (Pet. App. C) Since final approval, the parties have implemented the foregoing provisions of the Settlement Agreement.

As a term of the Settlement, the parties agreed to negotiate the amount of fees and costs to be awarded plaintiffs, and that failing agreement on the issue to allow the district court to determine the amount of attorney's fees and costs to be

awarded plaintiffs' counsel. 1/ (Pet. App. C at A-55) Having failed to reach agreement, Plaintiffs filed a motion seeking fees in the amount of $409,846.88 representing 2771.75 attorney hours and 244.25 hours for paralegal work, and reimbursement for costs incurred during the litigation in the amount of $90,571.92. Delta opposed plaintiffs' application for attorney's fees and costs on numerous grounds, contending among other things that plaintiffs should be denied fees because they failed to obtain every form of relief sought from alleged sex dis-

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1/ Section XI of the agreement provided as follows: "After final approval of this agreement, the parties shall negotiate concerning the amount of the costs, including attorneys' fees, to be awarded, subject to court approval. Should the parties fail to agree on this issue within thirty-five (35) days of final approval of the Settlement Agreement, and no appeal having been taken from the approval order, plaintiffs may file a motion according to the court's regular calendar procedures seeking an award of costs including reasonable attorneys' fees."

crimination in their suit. The parties extensively briefed the underlying and factual and legal issues concerning the appropriateness of the fee award. 2/

Following a hearing on the matter, the District Court entered judgment on December 5, 1980 awarding plaintiffs attorney's fees in the amount of $221,634.88 and costs in the amount of $83,918.51. 3/ While credit was given for all hours spent

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2/ The parties filed briefs totaling more than 200 pages regarding the fees and costs issue. Attached as Appendix A is an excerpt from one of Respondents' briefs filed in the District Court which addresses the issue of the extent to which plaintiffs prevailed. Plaintiffs address each of the criticisms made by Delta concerning their alleged failure to obtain certain forms of relief under the agreement. Not only did the settlement provide substantial relief, but the lawsuit had a "catalytic" effect of enhancing promotional and transfer opportunities for female employees. (See App. A) At the hearing of the motion for attorneys' fees, Delta conceded that the hours spent by co-counsel Leavy and Magaro were entirely reasonable and essentially nonduplicative.

3/ On March 21, 1981 the District Court granted plaintiffs $2,700.00 in additional fees incurred in bringing their motion for attorneys' fees.

by plaintiffs' counsel, the court reduced the hourly rates claimed from $100 per hour for Ms. Leavy and Mr. Magaro to $70 and $65 per hour, respectively. Due to the contingent nature of the case, the complexity of the issues, and because the results achieved were "significant," the court adjusted the lodestar upward by 20 percent. The court denied plaintiffs request for reimbursement of travel expenses totaling $6,653.41.

Delta did not, on the whole, dispute the reasonableness of the number of attorney hours or paralegal time spent on the litigation by plaintiffs, but argued essentially that plaintiffs should not be considered to be a prevailing party because the relief obtained under the Settlement Agreement was not substantial. Delta also contended that most of the costs for which plaintiffs sought reimbursement were not recoverable. Plain-

tiffs argued that the Settlement afforded substantial relief to the class and, further, that the lawsuit acted as a "catalyst" to bring about significant benefits to the class, including increased promotional opportunities, beyond the relief provided in the agreement. (See App. A)

After careful analysis and consideration of the evidence presented, the District Court found that the hours claimed by plaintiffs' attorneys were reasonable and that the class had been well represented by experienced counsel. The Court concluded that plaintiffs were "successful" in negotiating the Settlement, and that the results achieved by plaintiffs were "significant" and not "negligible" as Delta had argued. (Pet. App. B at A-22 to 24)

On appeal, the Ninth Circuit affirmed the District Court's award and found that

there was no evidence of abuse of discretion. Rather, the Court found that "the judge made a careful analysis of the appropriate award on attorney's fees." The Court held the fact that plaintiffs did not obtain every form of relief sought did not require a reduction in the amount to be awarded. It concluded that Plaintiffs were entitled to an award for all attorney time because it was spent in pursuit of their ultimate goal, to remedy the same injury, sex discrimination.

The Court further held that the District Court acted within its discretion in awarding out-of-pocket costs and expenses sought by plaintiffs. The Court found that the clearly expressed legislative purpose of Title VII could not be effectuated unless plaintiffs are allowed to recover their full costs of litigation. Moreover, the Court held it was proper for the District Court to award consulting and

expert witness fees to plaintiffs due to "special circumstances" which were demonstrated by the reasonable needs of the litigation.

Delta filed this petition for writ of certiorari following the Ninth Circuit's unanimous denial of its petition for rehearing and for a rehearing en banc. The order denying Delta's petition indicates that the full court of the Ninth Circuit had been advised of the suggestion for en banc rehearing and that no judge of the court requested a vote on the suggestion for rehearing en banc.

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS AFFIRMING AN AWARD OF ATTORNEY'S FEES TO PLAINTIFFS FOR ALL TIME REASONABLY SPENT WHEN PLAINTIFFS ESSENTIALLY SUCCEEDED ON THE CASE AS A WHOLE IS CONSISTENT WITH DECISIONS IN THE NINTH CIRCUIT AND OTHER CIRCUITS

The district court's broad discretion to determine reasonable attorney's fees has been well recognized in the circuit courts. E.g., Sangster v. United Air Lines, Inc., 663 F.2d 864 (9th Cir., 1980); Copeland v. Marshall, 641 F.2d 880 (D.C.Cir. 1980). In civil rights litigation, this Court has found that the amount of the award should not be such that it would discourage others from seeking to attack discriminatory practices. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968). Thus, a prevailing plaintiff should ordinarily receive an attorney's fee unless "special circum-

stances" would render the award unjust. Id. at 402. The trial court must consider the Congressional objective of giving victims of discrimination access to the courts when determining an appropriate fee award. Moreover, the scope of review of the district court's exercise of discretion in awarding attorneys fees is narrow and will be upset on appeal only if there is a clear showing of abuse of discretion. Copeland v. Marshall, supra, 641 F.2d at 901; In Re Gypsum Antitrust Cases, 565 F.2d 1123, 1128 (9th Cir., 1977).

The attorney's fee provision of Title VII, 42 U.S.C. § 2000e-5(k), is to be construed liberally due to the vital importance of civil rights laws and the corresponding necessity of private enforcement. Bolton v. Murray Envelope Corp., 553 F.2d 881, 884 (5th Cir. 1977). The purpose of section 706(k) of Title VII is "to insure that attorneys will under-

take representation in this type of case." Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437, 447 (5th Cir.), cert. denied 419 U.S. 1033 (1974). The district courts must keep this Congressional objective in mind in calculating an appropriate award in each case.

A review of the Ninth Circuit's decision in the instant case shows that the Court applied the correct and appropriate legal standards for reviewing the District Court's award. Contrary to Petitioner's contention, the issue of the extent to which plaintiffs prevailed was indeed considered in its proper context. Petitioner's characterization of relevant decisions in other circuits, as well as those in the Ninth Circuit, is not only inaccurate, but is also misleading as applied to the facts of the instant case. A careful analysis of the cases demonstrates that the Court's decision is

consistent with decisions in other circuits and is well supported by the authorities.

In determining the amount of the fee award, the District Court followed the "lodestar" approach adopted in Lindy Bros. Bldrs., Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d Cir., 1973), combined with the approach followed under Title VII in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir., 1974). Initially, the Court weighed a number of factors listed in Johnson to determine the legitimate hourly rate. The court then determined the reasonableness of the attorney time spent in the case. The Court multiplied the reasonable number of hours spent times the hourly rate to reach the lodestar figure. The Court then considered whether to adjust the lodestar upward or downward based upon the contingent nature of the

fee, the novelty and complexity of the litigation, and the results achieved. In making its analysis the Court considered Delta's contentions that plaintiffs did not prevail and failed to obtain any significant relief. The Court concluded that the results obtained were "significant" and not "negligible" as Delta had contended. (Pet. App. B at A-22, 23).

The circuit courts have consistently held that attorney's fees will be awarded for all time reasonably spent when plaintiff prevails on the underlying issue of the case. In Copeland v. Marshall, supra, 641 F.2d at 891-92 (D.C.Cir., 1980), the District of Columbia Circuit stated in dicta that no compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail, but noted:

> However, it sometimes will be the case that a lawsuit will seek recovery under a variety of

> legal theories complaining of essentially the same injury. A district judge must take care not to reduce a fee award arbitrarily simply because a Plaintiff did not prevail under one or more of these legal theories. No reduction in fee is appropriate where the 'issue was all part and parcel of one matter,' Lamphere v. Brown University, 610 F.2d 46, 47 (1st Cir., 1979), but only when the claims asserted 'are truly fractionable.'

Id., 641 F.2d 80 at 892, n. 18.

Subsequently, in National Ass'n. of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir., 1982), the District of Columbia Circuit Court reiterated that time should be excluded "only when the claims asserted are truly fractionable." Id., 675 F.2d 1319 at n.13. The court also emphasized that contests over fees should not be permitted to evolve into exhaustive trial-type proceedings because "attorneys would be deterred from undertaking FOIA and Title VII actions if each victory on the

merits were inevitably but the prelude to an exhausting and uncertain battle over fees. This would frustrate the purposes of FOIA and Title VII." Id., 675 F.2d 1319, 1324. There is no dispute that all plaintiffs' claims for relief in the instant case are related to remedying essentially the same injury, sex discrimination, through a variety of legal theories. Thus, contrary to Petitioner's contention, the cases in the District of Columbia Court of Appeals support the conclusion that plaintiffs should be compensated for all time spent achieving their ultimate goal even though they were not successful on all theories.

Petitioner's reliance on Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir., 1978), as First Circuit authority is equally misplaced. Nadeau was a multiple claims prisoners' rights case in which plaintiff prevailed in only one of several claims

which were truly "fractionable." In Lamphere v. Brown Univ., 610 F.2d 46, 47 (1st Cir., 1979), the First Circuit specifically distinguished its holding in Nadeau in affirming an award of fees or all time spent in a Title VII employment discrimination class action case under circumstances which were virtually the same as those presented in the instant case. The Court affirmed an award of fees of $272,600.00 incurred in lengthy discovery, pretrial proceedings, trial preparation and settlement negotiations. Compensation was given for over 3,500 attorney hours expended in obtaining a settlement, including time spent by counsel in an unsuccessful attempt to broaden the scope of remedies available.

The Third Circuit, in Hughes v. Repko, 578 F.2d 483, 487 (3d Cir., 1978), followed a similar approach stating that "a prevailing party on a particular claim

is one who bearly can be found by the district court to have essentially succeeded . . . because in many cases a party may prevail on his basic claim but not on all aspects thereof." The Court of Appeals in that case reversed the district court's reduction of the lodestar fee by an arbitrary percentage, holding that it was legally impermissible to do so simply because Plaintiff had not prevailed on all claims. The Court stated: "[i]mplicit in our analysis is the recognition that legal services fairly devoted to successful claims are compensable even though those very same legal services also supported the prosecution of the unsuccessful claims." Id., 578 F.2d at 487.

Petitioner mistakenly contends that the Seventh Circuit has followed a different rule than the Ninth Circuit in the present case. In Dawson v. Pastrick, 600 F.2d 70 (7th Cir., 1979), the Court held

that an award of fees depends upon whether the Plaintiff prevailed in a practical sense and did not require success on every issue. Id. at 78. The court in Dawson specifically distinguished Roesel v. Joliet Wrought Washer Co., 596 F.2d 183, 187 (7th Cir., 1979) and other cases relied upon by Petitioner [4/] stating that Roesel involved an individual plaintiff while the Dawson case benefited a class. Other Seventh Circuit decisions have awarded full attorney's fees to plaintiffs who did not prevail on all issues. Coop v. City of South Bend, 635 F.2d 652 (7th Cir., 1980). (fee award is to be based on

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4/ The decisions in Muscare v. Quinn, 614 F.2d 577 (7th Cir., 1980) and Bushe v. Burkee, 649 F.2d 509 (7th Cir., 1981) relied upon by Petitioner involved situations in which an individual plaintiff failed to prove one or more substantive claims but prevailed on a procedural due process issue. Thus, the Plaintiff in those such cases did not prevail in a practical sense. "The circumstances of each case must be individually considered in determining who is the prevailing party." Dawson v. Pastrick, 600 F.2d at 79, n.13. (7th Cir., 1979)

a totality of the case in light of the purpose of the Act: "to permit and encourage plaintiffs to enforce their civil rights"); Murphy v. Kolovitz, 635 F.2d 662 (7th Cir., 1981) (plaintiff prevailed in a practical sense and is entitled to the award); Syvoc v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149 (7th Cir., 1980) (plaintiff essentially succeeded in age discrimination claim, and reduction of attorneys fees for failure to succeed on damages issues was error). See, also, Sherkow v. Wisconsin, 630 F.2d 498 (7tn Cir. 1980)(plaintiff who prevailed on part but not all of her discrimination claim entitled to fees for all time reasonably spent).

The Tenth Circuit is also in accord with the approach followed by the Ninth Circuit. In Gurule v. Wilson, 635 F.2d 782, 791-92 (10th Cir. 1980), the Court held that it was inappropriate to reduce

an attorney's fee for every unsuccessful motion where the plaintiff prevails overall in the main issue in his case. And in Littlefield v. Deland, 641 F.2d 729 (10th Cir. 1981), the Court concluded that attorneys' fees may be awarded for work on "issues of fact or law upon which plaintiff ultimately did not prevail so long as they were reasonably calculated to promote the clients' interest." Id. at 733.

In the instant case the District Court found that plaintiffs "successfully negotiated a settlement agreement on behalf of a class of 8,700" and four named plaintiffs. 5/ (See Pet. App. B at A-22).

5/ The fact that plaintiffs prevailed through a settlement does not lessen their claim to fees. In Maher v. Gagne, 488 U.S. 122 (1980), this Court referred to the legislative history of the Attorneys Fees Act, 42 U.S.C. § 1988, and found that plaintiffs may prevail when they vindicate rights through a consent judgment or without formally obtaining relief:

> The fact that [plaintiff] prevailed through a settlement rather than

Although plaintiffs did not obtain every form of relief originally sought in their suit, they were successful in remedying the underlying claim of their case, sex discrimination, and in providing a mechanism for redressing future claims of discrimination. 6/ Under such circumstances the Ninth Circuit and all other

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5/ (continued)
through litigation does not weaken her claim to fees. Nothing in the language of section 1988 conditions the District Court's power to award fees on full litigation of the issues or in a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, p.5 (1976). Maher v. Gagne, 488 U.S. 122, 129 (1980).

6/ The agreement included open-ended relief for all class members from sex discrimination, a complaint process to deal with any sex discrimination complaints which might arise in the future, changes in job descriptions and enhancement of transfer and promotional opportunities for female employees.

circuits have held consistently that attorney's fees should be awarded for all time reasonably spent on the litigation by plaintiff's counsel. 7/ Manhart v. City of Los Angeles, 652 F.2d 904, 909 (9th

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7/ Contrary to Petitioner's contention, other Ninth Circuit decisions do not conflict with the ruling in the present case. In Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir., 1979), cert. denied, 444 U.S. 1046 (1981), the court of appeals stated in dicta that the amount of fees should be based on work performed on issues in which plaintiffs were successful, but specifically rejected the trial court's ruling denying fees because the plaintiff was only partially successful. Subsequently in Manhart v. City of Los Angeles, supra, the court upheld a fee award which included time spent in preparing claims dismissed by the district court. The court distinguished Sethy stating that: "no compensation may be paid for time spent to prepare unrelated claims in which plaintiff did not prevail." However, the court held that where, as here, "plaintiffs pursued several claims to remedy the same injury, gender discrimination," they "are entitled to an award for all time spent in pursuit of their ultimate goal." Manhart, supra, at 909. In Bartholomew v. Watson, 665 F.2d 910, 915 (9th Cir., 1982), the court suggested that the fees awarded may have been reasonable for services performed on successful issues even though plaintiffs did not entirely succeed. Due to uncertainty of the record the case was remanded for further findings by the district court. Thus, Sethy and Bartholomew can be reconciled with the holding in Manhart and the findings of the Court in the present case.

Cir., 1981); Seattle School District v. Washington, 633 F.2d 1338, 1349 (9th Cir., 1980); Northcross v. Board of Education, 611 F.2d 624, 636 (6th Cir., 1979), cert. denied, 447 U.S. 911 (1980); Bonnes v. Long, 599 F.2d 1316 (4th Cir., 1979); Watkins v. Scott Paper Co., 530 F.2d 1159, 1198 n.53 (5th Cir. 1976), cert. denied, 429 U.S. 861, 97 S.Ct. 63, 50 L.Ed. 2d 139 (1976); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir., 1981); Brown v. Bathke, 558 F.2d 634, 637-38 (8th Cir., 1978).

In an analogous situation, this Court has held that it was proper to allow fees to be awarded to plaintiff where a pendent constitutional claim is involved, even though the claim on which plaintiff prevails is one for which statutory fees are not authorized. Maher v. Gagne, 448 U.S. 122, 132, 65 L.Ed. 2d 653 (1980). The Court said:

> Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication.
>
> Id., at 448 U.S. 132.

The foregoing demonstrates that the circumstances of each case must be considered on a case-by-case basis by the district judge in determining the amount of fees to be awarded to the prevailing party. The courts have held consistently that attorney's fees should be awarded for all time reasonably spent when plaintiff prevails on the case as a whole. Generally, only time spent pursuing "fractionable" or "unrelated" claims in multiple claims cases is noncompensible. The present case is a single issue sex dis-

crimination case, [8] and there is no dispute that any of the attorney hours claimed were spent pursuing unrelated or fractionable claims. Nor is their evidence that time was spent pursuing frivolous or bad faith claims.

Plaintiffs' counsel engaged in lengthy discovery and other pretrial proceedings and motions, trial preparation and settlement negotiations, occupying nearly 2,800 attorney hours in successfully achieving a settlement on behalf of a nationwide class and the named plaintiffs. Since plaintiffs succeeded on the case as a whole, the District Court exercised sound discretion in awarding fees for all time reasonably spent on the litigation.

8/ Apart from an individual cause of action for each of the four named plaintiffs, the complaint in the present case states only one cause of action, alleging that Delta committed unlawful sex discrimination against the class and named plaintiffs.

At no time during the litigation of the fee issue has Delta suggested how the court might dissect this case into issues or parts of issues and calculate hours spent on issues in which plaintiffs purportedly did not prevail. Indeed, such an approach is completely impracticable. Contrary to the interests of judicial efficiency and economy, it would result in endless litigation over minor discrepancies and interpretations of time records to determine whether time was spent on "prevailing" issues. The courts must "be mindful that in complex civil rights litigation . . . issues are overlapping and intertwined." Jones v. Diamond, 636 F.2d at 1382. As the Sixth Circuit stated in Northcross v. Board of Education, supra:

> There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into 'issues and parts of issues as to which the plaintiffs did

> not prevail,' especially by decimating the total hours claimed with arbitrary percentages. Suffice it to say, however, that Congress has mandated that a prevailing party's attorney should be compensated 'as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter.' We know of no 'traditional' method of billing whereby an attorney offers a discount based upon his or her failure to prevail on 'issues or parts of issues.'
>
> 611 F.2d at 636.

The "lodestar" approach followed by the District Court in the present case provides a practical method for apportioning the fee according to the extent to which plaintiffs prevailed. First the court multiplies the number of hours reasonably spent on the successful litigation times the reasonable hourly rate to determine the lodestar figure. 9/ Then

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9/ Hours may be deducted for duplication, padding, or time spent on frivolous and bad faith claims. See, Northcross, supra at 636.

the court considers whether to adjust the lodestar upward or downward by applying a multiplier based upon a number of factors including the extent to which the plaintiff prevailed (results achieved). In this manner, the court is able to make a fair and just fee award without engaging in exhaustive trial-type proceedings thereby avoiding endless litigation over the number of hours spent on issues on which plaintiff prevailed.

In the present case after arriving at a lodestar figure, the Court considered whether to increase the figure by 50 percent as plaintiffs urged, or to follow Delta's suggestion to reduce it to 10 percent of the lodestar because of "the modesty of the result achieved." The Court concluded that "a multiplier of 1.2 [20 percent] was reasonable and appropriate in light of the circumstances of this particular case." (Pet. App. B. at A-22)

The Court's finding that the results were "significant" as well as its application of other factors to determine an appropriate multiplier (contingent nature of the fee; complexity of issues), is well supported by the record.

Finally, there is no merit to Petitioner's contention that the Court should grant certiorari in the present case because this Court granted certiorari on a similar question under 42 U.S.C. § 1988 in Hensley v. Eckerhart, No. 81-1244, ___ U.S. ___, 71 L.Ed. 2d 47, 50 U.S.L.W. 3695 (Mar. 1, 1982). The Hensley case can be distinguished from the instant case in several respects. Hensley is a multiple claims case involving the rights of mental patients in which plaintiffs lost on several significant claims after a trial on the merits. The present case was brought under Title VII to remedy essentially one injury, sex discrimination, and

plaintiffs successfully negotiated a settlement prior to trial which achieved their objective. Moreover, by adopting the "lodestar" approach to calculate the fee in the instant case, the District Court followed the method advanced by both parties for determining the fee. Thus, the Court did not reject the defendant's proposed methodology for calculating the fee as the court did in Hensley. Also, in Hensley, the appeals court did not issue a written opinion and summarily affirmed the lower court's fee award without analysis or reasoning of the issue raised. The Ninth Circuit in the present case made a careful review of the District Court's fee award, and wrote a well-reasoned published opinion which is supported amply by the record and by applicable case authority in other circuits. A further distinction is plaintiffs' contention made to the Ninth Circuit that under the terms of the Set-

tlement Agreement the attorney fee award of the District Court was final and non-appealable.

The issue presented in the instant case is more directly on point with the decision in Northcross v. Bd. of Educ., 611 F.2d 624 (6th Cir., 1979), cert. denied, 442 U.S. 911 (1980), relied upon by the Ninth Circuit in its opinion. Thornberry v. Delta Air Lines, Inc., 676 F.2d 1245, 1244 (9th Cir. 1982). In Northcross, the Sixth Circuit closely analyzed the legislative history of the Attorney's Fee Act which was intended to be construed in pari materia with section 706(k) of Title VII, and rejected the approach advanced by Petitioner in the present case. Concerning the calculation of the fee award, "Congress has mandated that a prevailing party's attorney should be compensated 'as is traditional with attorneys compensated by a fee-paying

client, for all time reasonably expended on a matter.'" 10/ Thus, denial of certiorari in the present case would be consistent with the Court's refusal to grant certiorari in Northcross.

Petitioner has failed to demonstrate any basis for a review of the decision of the Ninth Circuit in this case. The decision of the Ninth Circuit does not conflict with decisions in other circuits. The determination of an appropriate fee award is a matter of trial court discretion, and there is no evidence to show that the district judge abused his discretion in any way. The District Court properly considered the extent to which plaintiff prevailed along with other appropriate factors in calculating the fee award. As the Court of Appeals found,

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10/ Northcross v. Board of Educ., supra at 636; Senate Report No. 94-1011, reprinted in 1976 U.S. Code Cong. & Admin. News p.5908.

"[i]f anything, the evidence is all on the other side, that the judge made a careful analysis of the appropriate award of attorneys' fees." Therefore, Petitioner's request for a writ of certiorari should be denied. 11/

II

THE COURT OF APPEALS' RULING THAT THE TRIAL JUDGE ACTED WITHIN HIS DISCRETION BY AWARDING OUT-OF-POCKET COSTS AND EXPENSES DOES NOT CONFLICT WITH 28 U.S.C. § 1920, DECISIONS OF THIS COURT, OR DECISIONS IN OTHER CIRCUITS

Petitioner contends, as it has in the lower courts, that the Court's award of

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11/ Respondents also oppose Petitioner's suggestion that the Court hold the present case in abeyance pending its decision in Hensley. Because the issue presented in Hensley is distinguishable, the disposition of that case is unlikely to affect the fee award in the present case. Plaintiffs' attorneys have yet to receive any compensation two and one-half years following the execution of the settlement, when plaintiffs question the very right to appeal the fee award in the first place. There is no evidence that the Court acted arbitrarily or abused its descretion in any way. It would be unjust and onerous to allow Delta to continue to benefit by using and investing fees which are rightfully due and owing plaintiffs.

certain "costs," including fees for consultants and experts, is in conflict with 28 U.S.C. § 1920 and the case law interpreting and applying that statute. However, section 1920 is complementary to Rule 54(d), F.R.Civ.P., which relates to taxation of costs, as a matter of course, to a successful litigant after trial on the merits. Clearly, plaintiffs' entitlement to costs stems from the statutory attorney's fee provisions of Title VII, 42 U.S.C. § 2000(e)-5(k), and the well established principle that plaintiffs who have obtained a benefit for a class through settlement are deemed to be prevailing parties for purposes of an award of fees and costs. 12/ Thus, an award of costs under Title VII is not limited by section 1920, and the cases cited by Petitioner have no application to the present case.

12/ See note 5, supra.

In holding that the trial court had discretionary authority to award certain cut-of-pocket costs and expenses sought by plaintiffs in their application for attorney's fees, the Ninth Circuit Court stated:

> Perhaps the most important justification for awarding costs like these is that the refusal to compensate such costs would make it difficult, if not impossible, to effectuate the purpose of Title VII, which has been characterized by the Supreme Court as follows: 'To make persons whole for injuries suffered on account of intentional employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers.' Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (emphasis added).
>
> Needless to say, the clearly expressed legislative intent cannot be effectuated unless the court has the option to allow plaintiffs to recover the full costs of litigation.
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> Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240, 1244-45 (9th Cir. 1982).

With respect to consulting and expert witness fees, the Court of Appeals indicated that the district court's discretion to award such expenses may be limited to situations in which there is a showing of "special circumstances." See, Chapman v. Telephone and Telegraph Company, 456 F. Supp. 77, 83-84 (N.D.Cal. 1978), and cases cited therein. In the instant case, there was evidence of special circumstances because the District Court found that the testimony of the expert computer witnesses was essential both to prove plaintiffs' prima facia case through the use of statistics and to rebut the defendant's "lack of interest" defense. Thus the Court concluded that the District Court's award of such fees was within its discretionary authority.

Petitioner concedes, as it must, that the Court's opinion is supported by decisions in the Fifth and Sixth Circuits.

See, Northcross v. Board of Education, 611 F.2d 624, 639 (6th Cir., 1979), cert. denied, 447 U.S. 911 (1980); Jones v. Diamond, 636 F.2d 1364, 1382 (5th Cir., 1981). Petitioner has failed to cite any contrary decisions in civil rights cases. The Fifth Circuit in Jones v. Diamond, supra, held that plaintiffs were entitled to recover such costs explaining that:

> Congress has manifested an intention that a different rule be applied in civil rights litigation . . . counsel must have the assistance of experts to furnish effective and competent representation. In most civil rights litigation, . . . expert testimony is a vital ingredient in the proper presentation and decision of a case. Without the ability to recover expert fees, plaintiffs, . . . will be unable to bring these cases.
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> 636 F.2d at 1382.

It is clear that the District Court had discretionary authority as mandated by Congress to make an attorney's fee award which included reimbursement for costs and

expenses not included under section 1920. The Court's decision does not conflict with section 1920 or with cases in other circuits allowing out-of-pocket costs and expenses in Title VII cases. Courts have frequently awarded expert witness fees and other costs and expenses not taxable under 28 U.S.C. § 1920 in employment discrimination cases. See, E.E.O.C. v. Datapoint, 421 F. Supp. 406, 410 (W.D.Texas 1976) aff'd in part and remanded in part on other issues, 570 F.2d 1264 (5th Cir. 1978); Sabala v. Western Gillette, Inc., 371 F. Supp. 385 (S.D.Texas 1974); Women's Committee v. National Broadcasting Company, 76 F.R.D. 173, 182 (S.D.N.Y. 1977); Commonwealth of Pennsylvania v. O'Neill, 431 F. Supp. 700, 713 (E.D.Penn. 1977). See also, E.E.O.C. v. Kenosa School District, 22 F.E.P. Cases 1367 (7th Cir., 1980). Indeed, to deny plaintiffs their substantial costs which were essential to

establish a prima facie case and rebut Delta's defense would virtually guarantee that no attorney, no matter how well motivated, could afford to "bring private actions to enforce civil rights laws," a result directly contrary to the expressed legislative intent of Title VII.

Finally, Petitioner's contention that the Court of Appeals' decision is in conflict with decisions of this Court in Farmer v. Arabian American Oil Co., 379 U.S. 227, 235 (1964), and Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240 (1975) is clearly incorrect. In Farmer, this Court court did not consider an award of costs and expenses under a statutory attorney's fee provision. As shown above, a different rule applies in civil rights litigation because Congress has expressed an intention to effectuate civil rights statutes by giving the courts full equitable powers.

Moreover, the Court's decision in Alyeska can be distinguished from the instant case on several grounds, including Petitioner's admission that the Court was considering only the question of attorney's fees as "costs." Section 706(k) of Title VII provides the courts with express statutory authority to award costs including reasonable attorney's fees. Furthermore, it is well known that this Court's decision in Alyeska led to the subsequent enactment of the Civil Rights Attorney's Fee Awards Act, 42 U.S.C. § 1988, which gives the federal courts express authority to grant an award of fees and costs to prevailing plaintiffs as part of the remedial purpose of civil rights statutes. There can be no question that the decision in Alyeska is no longer applicable in civil rights cases and that the Fees Act would dictate a different result were the issue to be decided today.

In sum, the decision of the Court does not conflict with applicable authority. On the contrary, the award of expenses and costs is entirely consistent with the Congressional intent of effectuating the purposes of Title VII. Therefore, the court should deny the petition for writ of certiorari.

CONCLUSION

There is no conflict among the circuits with respect to the legal principles and guidelines applied by the Ninth Circuit for a determination of an appropriate attorney's fee and cost award under the facts of the instant case. Therefore, Respondent prays that the Petition for A Writ of Certiorari to review the judgment

and opinion of the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

GERALD E. MAGARO
Attorney for Respondents

DATED: August 30, 1982.

(Appendices follow)

APPENDIX A

EXCERPT FROM RESPONDENTS' REPLY MEMORANDUM IN DISTRICT COURT TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

C. The Settlement Agreement Affords Substantial Relief to the Class.

Plaintiffs have, at pages 15-23 of their Opening Memorandum, outlined the scope of relief afforded to the class by the Settlement Agreement. Defendant, however, attempts to minimize these achievements by characterizing them as either redundant of practices already in effect at Delta or as providing no rights for the class other than those they would have enjoyed in the absence of the agreement. A cursory review of the provisions of the agreement, however, demonstrates the falsity of Defendant's contention.

1. The Claims Procedure.

As stated by Defendant, the heart of the settlement is a claims procedure which gives class members the right to present

individual claims for relief from unlawful discrimination. The claims procedure negotiated by Plaintiffs is extremely favorable to the class. Some of the more prominent features of the claims procedure are the following:

a. The claims procedure includes all class members, nationwide, and includes all job positions in the departments certified by the Court (Traffic and Marketing). Thus, all members of the class certified by the Court are included in the claims procedure.

b. The scope of the issues which claimants can raise through the claims procedure is broad, including all forms of employment discrimination based on sex, except refusal to hire, termination, and maternity leave issues. Refusal to hire was excluded because the Court did not include unsuccessful applicants in the class, and hiring thus was

not at issue. Termination issues are highly individualized and, as Defendant states in its brief, there is no data which would support a class-wide finding of liability in terminations. Thus, failure to have termination claims included in the procedure did not represent a significant loss to Plaintiffs. Maternity leave issues were excluded by Order of the Court shortly before the case was scheduled for trial, and thus were not included in the claims procedure. Thus, the settlement claims procedure that was negotiated by Plaintiffs is as broad in scope as that which would have been ordered by the Court for Stage II proceedings had Plaintiffs proceeded to trial and established class-wide liability at Stage I.

c. The procedure provides claimants with the opportunity to obtain all relief to which they are entitled,

including non-monetary relief such as job placement, i.e., transfer or promotion, as well as back-pay and "front-pay."

d. The amount of money which may be awared [sic] to each claimant as back-pay or front-pay is completely unlimited. Thus, the amount of monetary relief available to class members is totally open-ended.

e. The total number of class members who may file claims is unlimited. Any of more than 8,000 class members was given full opportunity to file a claim.

f. Claimants are provided with representation by class counsel, free of charge, during Stage I of the proceedings. Subsequent to Stage I, class counsel may continue to provide representation on a contingency basis. Furthermore, certain class discovery is to be made available to claimants who choose to

represent themselves or be represented by other counsel.

g. Claimants are afforded the right to be represented by counsel of their own choosing at any stage of the proceedings.

h. The claims procedure provides for expedited and extensive discovery of relevant information during the initial evaluation and settlement phase of the claims procedure.

i. Defendant may be held liable for all costs and expenses incurred by successful claimants during the claims procedure including costs and attorneys' fees for successful claimants at the hearing stage, Stage III, of the procedure.

Defendant's contention that the claims procedure did little more than preserve for the class the same rights they would have had if the case had never

been brought or if the class aspects of the case had been dismissed without prejudice is totally disingenuous. (See Deft's Memo. at p. 10.) Defendant is fully aware that, were it not for the present litigation, the right of nearly every class member to file a charge of discrimination before the EEOC based on discrimination between February 9, 1973 and December 31, 1979, would have been totally extinguished because of the applicable 180-day statute of limitations. 42 U.S.C. §2002-5(e); Rodriguez v. Southern Pacific, 18 EPD ¶8932 (9th Cir. 1978); Wiltshire v. Standard Oil of California, 447 F. Supp. 756, 758 (N.D. Cal. 1978). Furthermore, the chances that class members could find an experienced Title VII attorney willing to accept their individual cases on a contingent fee basis would have been virtually nonexistent, absent the claims procedure. In reality, virtually none of

the class members filing claims would ever have proceeded to litigate their claims in Federal District Court.

Defendant's criticism that the settlement does not include claims concerning discrimination in departments other than Traffic and Marketing/ Sales is absurd since the class was limited to females in the Traffic and Marketing/Sales Departments. Even if Plaintiffs had proceeded to trial and prevailed on the merits, claims outside the Traffic and Marketing/ Sales Departments undoubtedly would have been excluded. It is noteworthy, however, that class members are entitled to file claims concerning transfer and promotion opportunities from the Traffic and Marketing/Sales Departments to any other department in Delta Air Lines.

Equally absurd is Defendant's contention that the claims procedure is weakened by the absence of a settlement

fund. Had there been a fund there would have been an absolute limitation on the amount of money that could be paid to claimants. Under the negotiated procedure, the amount that may be paid out is open-ended, affording claimants the opportunity to obtain full monetary relief, without regard to any ceiling on payments.

Defendant also focuses on Plaintiffs' failure to achieve through settlement a procedure by which claimants would bring with them to the trier of the fact an initial presumption that they had been the victims of discrimination (as mandated for Stage II proceedings after trial on liability issues in Teamsters v. U.S., 431 U.S. 24 (1977)). Thus, Defendant contends, the claimant in the claims procedure, unlike the claimant in a Stage II proceeding, bears the same burden of pleading and proving disparate treatment in accordance with McDonnell Douglas v.

Green, 411 U.S. 792 (1973), as the Plaintiff in an individual Title VII action.

Obviously Plaintiffs would have preferred a claims procedure which placed the initial burden of proving non-discrimination on Defendant. A review of the settlement correspondence indicates that Plaintiffs' counsel attempted to obtain such a procedure. However, Plaintiffs' counsel ultimately decided to yield to Defendant on this point, after concluding that an initial presumption in favor of the claimant had little more than symbolic value, as under the applicable case law it could be rebutted by Defendant's mere articulation of legitimate business reasons for the disputed actions. Similar judgments have obviously been made by counsel in numerous other settlements where Plaintiffs have been found to be prevailing parties. See, e.g., Westerlund v. Fireman's Fund, (C-75-1639 WAI N.D.

Cal. 1980) and Budreck v. Crocker Bank, (C-75-1100 CBR N.D. Cal. 1978). In both of these cases the claims procedure allocates burdens of proof in accordance with McDonnell Douglas v. Green, supra.

Defendant's contention that Plaintiff's entitlement to attorneys' fees should be affected by the "low number of claims filed" is clearly without merit. Compensation for processing of claims is dealt with separately in the settlement decree, and is not the subject of Plaintiffs' fee petition. Plaintiffs in this motion are requesting compensation for work performed up until the settlement was reached, not for the processing of claims.

Nor does the number of claims filed have any bearing on Plaintiffs' status as a prevailing party. A review of the claim ratios in other recent Title VII litigation underscores the fact that low claim rates are characteristic in all claims

proceedings. See, e.g., Budreck v. Crocker Bank, supra, where two hundred sixty-two (262) claims were filed from a class of approximately 16,000; Taberoff and EEOC v. Farmer's Insurance Company, C-74-1108 (D.C. Cal. 1978) where six hundred sixty-two (662) claims were filed from a base of over 20,000 class members; and four hundred seven (407) claims out of which one hundred ninety-three (193) were rejected as frivolous, from a class of 20,000 in Westerlund v. Fireman's Fund Insurance company, supra. The Court may take judicial notice of the fact that headquarter offices for Firemans' Fund and Crocker are in California, a state where female employees are highly aware of their rights under Title VII. In the instant case, the company headquarters are located in Atlanta Georgia, and the bulk of the company's employees likewise are employed in the South. These factors may well

serve to explain a somewhat lower claims ratio than was experienced in the Westerlund and Budreck cases.

That it is simply unfair to penalize Plaintiffs' counsel for the number of claims filed, after a successful settlement has been reached, is underscored by the opinion expressed by experienced EEOC counsel. As was stated by Mr. Fritz Wollett, an attorney with the Equal Employment Opportunity Commission, in his Affidavit in Support of Plaintiff' Opening Memorandum:

> "Mr. Magaro's request for attorney's fees should be evaluated and determined primarily by the skill and effort which he utilized in preparing plaintiffs' class for trial, not by the number of claims filed by class members in a Teamsters-mandated claims procedure, a factor obviously beyond plaintiffs' control. Based upon my personal familiarity with this case I believe that Mr. Magaro has prepared the Delta Air Line case for trial in a competent and thorough manner and that the settlement is fully consistent

> with the relief available in a Title VII class action and the facts of his particular case.
>
> While it is my understanding that only a small number of claims have been filed by class members this should not inure to Mr. Magaro's detriment. Indeed if the relief gained is to be used at all to measure the size of Mr. Magaro's fee, the apparent stimulus that this lawsuit has given Delta to comply with Title VII as evidenced by the increased promotional opportunities for its female employees since the filing of this action strongly suggests that the benefits for class members resulting from this action are substantial and justify the requested fee."
> (Wollett Decl. p. 5:3-21.)

In short, the number of claimants is simply irrelevant to the Court's determination concerning a reasonable fee.

2. Changes in the Job Description and Bidding Procedure for the Customer Service Agent Position

As shown in Plaintiff's Opening Memorandum (Plaintiffs' Memo, p. 19-20), the Customer Service Agent (CSA) job has been predominantly male throughout the period

of this litigation. It is one of two basic entry-level positions in the Stations Department, and it affords significant promotional opportunities in lines of progression different from those existing in the Traffic and Marketing/Sales Departments. One of the basic objectives of Plaintiffs in bringing this lawsuit was to enhance the opportunities of female employees working in the Traffic Department, primarily those in the Reservations Sales Agent position, to work in the Stations Department beginning at the entry-level CSA position.

The record reflects that persons employed in the CSA position may be assigned to one of several functional work areas, frequently on a more or less permanent basis. One of these functional work areas is the ticket counter at the airport. Other functional areas include

operations (ramp), cargo, fueling and gates.

The CSA position has been a "bid" position since the 1973 settlement agreement with the U. S. Government. However, the job announcement that was posted, from 1973 until this Settlement Agreement, when vacancies in the CSA position occurred, contained no reference to ticketing and gate assignments for CSA positions. (See Deft's Ex. C-1.) Rather, the announcement limited its description of CSA duties to the ramp, fueling and cargo functions, and emphasized the physical aspect of the job, including a 70-pound weight lifting requirement. Thus, although frequently specific openings would be for a gate or ticker [sic] counter assignment, the job assignment provided absolutely no clue to that fact. Thus, prior to the Settlement Agreement, an interested bidder could only determine the functional work area by sub-

mitting a bid, and being selected to fill the position. During the selection process, an interested bidder would be excluded from any further consideration if he or she was unwilling to accept work assignments in all functional areas, or failed to meet the weight lifting requirement.

The new job announcement, (See Deft's Ex. C-2) which eliminates the 70-pound weight lifting requirement and describes the ticketing and gate aspects of the job, represents a significant change, designed to encourage class members to bid on Stations Department positions. Additionally, the new procedure provides a mechanism for the prospective bidder to determine in advance of submitting a bid, the function for which the vacancy exists. Thus, a potential bidder who desires to work at the ticker [sic] counter or gate needs only to call the telephone number

indicated on the announcement in order to ascertain the job assignment, rather than go through the entire bidding process, only to determine, if ultimately the successful bidder, that she did not want the assignment for which the vacancy existed.

Defendant's contention that the changes in the job announcement are merely cosmetic, since the actual duties of the CSA positions were "common knowledge among the employees" is contrary to Plaintiff's counsels' experience in this litigation. As is indicated in Gerald Magaro's Supplemental Declaration, female Reservations Sales Agents did not realize that the CSA job position could include a permanent ticketing or gate assignment. The new procedure will dispel confusion and give interested bidders relevant information concerning the CSA job opening.

Defendant's contention that the failure of the Settlement Agreement to address promotional opportunities in the Stations Department weakens it is absurd. First of all, the class does not include any female employees in the Stations Department. Thus, promotions in that department are not directly at issue. More importantly, however, discovery in this case demonstrated that the problem related to "exclusion" of women from entry-level positions in the Stations Department, not to promotional opportunities for the miniscule number of females who managed to obtain entry-level positions in the Stations Department. Thus, Plaintiffs can hardly be faulted for their failure to achieve through settlement a solution to a problem -- promotional opportunities for females in the Stations Department -- which Plaintiffs have never alleged to exist. Only when a significant

number of women obtain entry-level positions in the Stations Department will promotional opportunities for women in that department become an issue. Should it become apparent in the future that women in CSA positions are being discriminated against with respect to promotional opportunities, this can be the subject of another lawsuit.

D. The Centralized Claim Process/Ombudsman Procedure Goes Beyong the Company's "Open Door" Policy.

Defendant contends that the decentralized complaint process established by the Settlement Agreement largely duplicates the so-called "open door" policy in effect prior to this action. That policy permits the employees to meet with any management official in the company to voice complaints against company policies or local supervisors and managers. As is indicated in the Supplemental Declaration of Gerald Magaro filed herewith, however,

Defendant's position in this regard was not sustained by information obtained through discovery. First of all, the "open door" policy provides no assurances of confidentiality. Secondly, the policy is not directed toward sex discrimination, but rather is simply a generalized mechanism for voicing employee complaints. Thirdly, the management officials who hear complaints pursuant to the "open door" policy are provided with no directives concerning the elements of a bona fide sex discrimination complaint. For this reason, as well as for other reasons, frequently related to their personal career ambitions, these officials almost inevitably support local management. As a result, persons utilizing the "open door" policy have frequently found themselves either on probation or terminated shortly thereafter. Faced with these adverse conditions, it is no wonder that class

members, despite the merits of their discrimination claims, rarely exercised their rights under the so-called "open door" policy unless matters had reached such a state that they were close to termination in any case and had nothing to lose.

The decentralized complaint procedure established by the Settlement Agreement represents a significantly improved mechanism for the handling of sex discrimination complaints. First of all, the process is specifically designed for the handling of sex discrimination complaints, and personnel staff members who have received specialized training concerning the requirements of Title VII and other equal employment laws are specifically designated to handle the complaints. Secondly, the complainant has the opportunity to voice her complaints with assurances of total confidentiality. Ob-

viously if she requests a full investigation of the complaint it will become necessary for her name to be disclosed in the process. However, the initial assurances of confidentiality are significant because they afford the complainant the opportunity to obtain a preliminary judgment from the designated staff member as to the possible merits of her claim without alerting local management to the fact that she has made the claim.

Third, the Settlement Agreement specifically provides that the staff members assigned to investigate the matter shall not be adversely affected by the substance of any report or recommendation made as a result of the investigation. Thus, the investigator is free from the career advancement and other pressures that might otherwise result in automatic support of local management policies, no matter how discriminatory.

Finally, the agreement provides that an explanation of this procedure shall be given to all class members. Thus, the mere giving of this explanation concerning the procedure emphasizes to class members that Delta has an internal mechanism for handling sex discrimination claims. This explanation in itself goes far beyond the prior notification to all employees of the existence of a so-called "open door" policy.

E. The Absence of Goals and Timetables from the Settlement Agreement Does Not Negate Plaintiffs' Status as a Prevailing Party.

Defendant places great emphasis on Plaintiffs' failure to obtain as part of the Settlement Agreement goals and timetables for the promotion of female employees. Plaintiffs readily concede that they initially sought goals and timetables as a part of the settlement. However, upon careful examination, it became ap-

parent to Plaintiffs' counsel that certain characteristics of Delta's employment structure, as herein described, together with the catalytic effect of the lawsuit itself, described infra in Section III(F), combined to render goals and timetables relatively unimportant.

Delta's employment structure differs radically from that of a typical corporate Defendant in a Title VII action. First of all, Delta's management functions are highly centralized in Atlanta Georgia. Thus, although there are six divisions in the company, 4/ each with five or more departments, personnel outside of the Atlanta headquarters operation are employed exclusively in the Stations Department of the Operations-Passenger

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4/ General Counsel and Secretary, Marketing, Operations, Operations-Passenger Service, Personnel, Finance and Treasurer.

Service Division, and in the Traffic and Marketing/Sales Departments of the Marketing Division. Secondly, even within the Stations, Traffic, and Marketing/Sales Departments, management functions above the level of manager are performed exclusively in Atlanta. Finally, even within the departments operating outside of the Atlanta headquarters office, the employment structure is heavily weighted toward entry-level positions. Typically, there is no more than one position above the level of Reservations Supervisor in a given Reservations Office. Thus, it can be expected that there will be very few openings in a given year, nationwide, for positions in reservations above that of Reservations Supervisor. The structure in the Stations Department is extremely similar. Although the Marketing Department is structured somewhat differently, promotional opportunities above the level

of Marketing Representative, Senior Marketing Representative, and Account Executive also are few.

Given Delta's organization and structure, it appeared that the only promotional opportunities to which the majority of class members could reasonably aspire were those in the three departments operating outside of the Atlanta headquarters -- Traffic, Marketing/Sales, and Stations. Thus, if goals and timetables were to be appropriate at all, they would need to be limited to these three departments.

The Stations Department, as noted above, has historically been virtually entirely male. Thus, goals and timetables, if appropriate at all, would appropriately be directed toward entry-level positions in the department. To a lesser degree the Marketing Department a historically been male-dominated. No

significant disparities appeared in the rates of promotion for men and the few women in the department from the entry-level Marketing Representative position to the higher management positions. Thus, in Marketing as well, goals and timetables, if appropriate at all, would logically have been limited to the entry-level Marketing Representative position. It was only in the Traffic Department, the department in which more than 90% of all class members, nationwide, are and have been employed, that women in the qualified labor pool appeared to be obtaining significantly fewer than their proportional share of promotions. This pattern was observable, moreover, only with respect to promotions to the first and second line supervisory positions (Assistant Supervisor and Supervisor). (See Plaintiffs' Exhibits 54(a) and 54(b), attached hereto as Exhibits B-1 and B-2.) The data indi-

cated that from the pool of qualified personnel, Supervisor and above, female employees were receiving their proportionate share of promotions to the few openings available in a given year, nationwide.

Given the foregoing employment patterns, the major focus of the lawsuit was to establish mechanisms for moving women out of the dead-end Reservations Sales Agent position, either into entry-level positions in Marketing/Sales or Stations, or into first and second line supervisory positions in Traffic, so that they would enjoy an equal opportunity to compete with males for upper-level positions in Traffic and promotional positions in Marketing/Sales and Stations.

Although Plaintiffs would have welcomed goals and timetables for first and second line supervisory positions in Traffic, and for entry-level positions in

Marketing/Sales and Stations, they concluded that their failure to obtain such goals was not critical to the success of the settlement and that other measures obtained through settlement, together with the catalyst affect of the lawsuit itself, appeared to be sufficient to achieve the same results. Thus, Plaintiffs determined that the changes in the job description and bidding procedures for the CSA position would attract more class members to this position, thereby placing them in the availability pool for promotional positions. Likewise, the posting of promotional opportunities for first and second level promotional positions in Traffic opened the process to public scrutiny, lessening the probability of discrimination by male supervisors and managers. This, combined with the fact there had been a substantial increase in the rate of promotions of women from the Reservations

Sales Agent position, (See Section III(F) infra) led Plaintiffs to conclude that while goals and timetables for promotional positions in the Traffic Department would have been desirable, they were not necessary.

Finally, although as is noted in Plaintiffs' Opening Memorandum, the Marketing Department had historically been hostile to the idea of women as Marketing Representatives, by the time settlement was reached, women appeared to be bidding in significant numbers for the relatively few openings for marketing positions, and to be obtaining these positions with as great a rate of success as their male counterparts. Thus, Plaintiffs saw no particular need for insisting on goals and timetables for marketing positions.

F. Defendant's Contentions to the Contrary Notwithstanding, The Record is Clear That This Lawsuit Has Brought About Significant Changes at Delta, Beyond Those Reflected by the Four Corners Of The Settlement Agreement.

The law is clear that the results achieved by Plaintiffs may also come about through other than the terms and conditions of the settlement itself. In this respect, several Courts have applied the "catalyst" concept. See, Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976). In Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970), Plaintiff's suit was described as the catalyst which forced Defendant to voluntarily comply with Title VII requirements. Thus, although Plaintiff did not prevail in his individual claim, the suit did force the employer into remedial action as the class and attorneys' fees were awarded, 433 F.2d at 430. Accord, Reed v. Arlington Hotel Company, Inc., 476 F.2d

721 (8th Cir. 1973). The "catalyst" principle was also recognized by the Court in Chicano Police Officers' Association, supra, where the Court noted the initial and continued impact on Defendant's employment practices.

Although Defendant goes to great lengths to obscure the facts, it is clear that there has been a significant improvement in employment opportunities for women at Delta during the pendancy of this action. Thus, a review of Defendant's Exhibit F indicates that in 1976, the year that the lawsuit was filed, women represented 81.3% of the available labor pool for promotion to Lead Agent, but only 58.5% of total promotions. Thus, women only received 71.9% (58.5& [sic] ÷ 81.3%) of the positions to which they were proportionately entitled. By 1977, the year after the lawsuit was filed, this proportion had increased to 81.8% (65.9% ÷

80.6%) and by 1978 the proportion had increased once again to 89.6% (73% + 81.9%). Thus, during the pendancy of the lawsuit, it is clear that there was a dramatic improvement in the opportunities for women to advance out of the historically dead-end position of Reservations Sales Agent. Because, as has been indicated above, women in the Reservations Sales Agent position constitute the overwhelming majority of the class, this one statistic demonstrates the beneficial affect of the lawsuit on opportunities for the majority of the class members.

A similar dramatic change appears in distribution by sex for higher level positions within the Traffic Department, an improvement even more significant, in view of the relatively few opportunities for movement into those positions over the years covered by the lawsuit. Thus, an analysis of Defendant's Trial Exhibits

(attached as Exhibit C) shows the following uniform upward trend in the proportion of women occupying supervisory and management positions in the Marketing/ Sales and Traffic Departments:

TRAFFIC

Supervisors

Year	Total	Fem.	Fem. as % of Total
1973	103	25	24
1974	105	32	30
1975	110	35	32
1976	119	44	37
1977	130	52	40
1978	153	72	47

Chief Supervisor

Year	Total	Fem.	Fem. as % of Total
1973	20	3	15
1974	22	3	14
1975	23	3	13
1976	23	4	17
1977	27	7	26
1978	30	8	27

Res. Mgr.

Year	Total	Fem.	Fem. as % of Total
1973	19	1	5
1974	20	1	5
1975	20	1	5
1976	20	3	15
1977	20	3	15
1978	19	4	21

MARKETING

Distribution by Sex of Persons in Marketing Representative Positions - (Includes Marketing Representative Trainee, Marketing Representative Cargo, Senior Marketing Representative, Senior Marketing Representative Cargo, Account Executive Marketing - Sales).

Year	Total	Fem.	Fem. as % of Total
1973	156	20	13
1974	155	19	12
1975	150	18	12
1976	153	26	17
1977	160	28	18
1978	173	37	21

In short, very likely in order to forestall the dreaded threat of Court-imposed goals and timetables, Defendant has made clear and unmistakable efforts to put its own house in order. Plaintiffs submit that the foregoing statistics constitute ample evidence of the catalyst effect of the Thornberry v. Delta action.

G. The Named Plaintiffs Have Received Substantial Relief.

Although Defendant contends that the named Plaintiffs have not prevailed in any significant manner, it is clear that the contrary is true. Since none of the named Plaintiffs is presently employed at Delta Air Lines, relief other than in the form of back-pay was clearly inappropriate. Two of the named Plaintiffs, Plaintiffs Thornberry and Farmer, have received one hundred percent (100%) of the back-pay which they would have been able to prove at trial. Although the other two named

Plaintiffs received somewhat less than they would have proved at trial had they prevailed on their termination claims, there is no dispute that the terminations claims would have been hard to prove. Thus, the settlement obtained for Plaintiffs Magel and O'Sullivan appears to have been favorable.

In this regard, Plaintiffs would call the Court's attention to the settlement in Westerlund v. Fireman's Fund, supra, a case in which Plaintiffs are clearly found to have prevailed under the applicable law. In that case the back-pay awards to eight Plaintiffs ranged from $1,500.00 to $6,000.00. Only one named Plaintiff was given a promotional opportunity. Clearly the relief obtained in this action is equivalent.

H. Plaintiffs Are Not Required to Obtain Relief On All Claims.

Defendant's contention that, because Plaintiffs did not obtain every form of relief sought for every claim in their Complaint, they are not the prevailing party, is contrary to all sound legal authority. See, e.g., Airline Pilots Assoc. v. United Airlines, 21 EPD §30,420 (E.D. N.Y. 1979) where the Court stated:

> "United next suggests that plaintiffs are not prevailing parties because they succeeded on only part of their case. The court does not agree . . . The court can find no reason why plaintiffs should be penalized for having sought additional relief . . . It is widely recog.ized that the purpose of this provision for counsel fees is to facilitate the bringing of individual complaints in order to 'effectuate the congressional policy against * * * discrimination.' Carey v. New York Gaslight Club, Inc., 598 F.2d 1253, 1256 (2d Cir. 1979); Johnson v. Georgia Highway Express, 588 F.2d 714, 716 (5th Cir. 1974), and that the policies of the attorney's fees provisions are 'best served by

> encouraging plaintiffs to seek the broadest relief they feel, in good faith, they are entitled to.' Palmer v. Rogers, [10 EPD ¶10,499] at 6130 (D.D.C. 1975). See also Newman v. Piggie Park Enterprises, 390 US 400 (1968)." (21 EPD at 13,393-94)

A similar result was obtained in Chicano Police Officers' Association v. Stover, supra, a case in which the class action was settled for the total sum of $16,000.00 without any injunctive or other form of relief. Rejecting the Defendant's contention that Plaintiffs were not a prevailing party because the sum paid was to avoid lengthy and costly litigation (i.e., a nuisance settlement), the Court found that Defendant's view of what constitutes a prevailing party was too narrow, stating:

> "[I]f a settlement provides some benefit to plaintiffs or some vindication of their rights, then the Congressional intent to encourage private enforcement of civil rights, see S.Rep. No. 1011, supra, at 5, will be fur-

> thered by the awarding of fees. This is true even when both sides lose something and gain something, resulting in a 'draw', as long as plaintiffs have received substantial benefits. See Dawson v. Pastrick, 600 F.2d 70, 78-79 (7th Cir. 1979). Therefore, the court must determine whether the basic objectives plaintiffs seek from the lawsuit have been achieved or furthered in a significant way. See Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979)." (Emphasis added.)

Following the same reasoning applied in the Airline Pilots Association and Chicano Police Officers' Association cases, many Courts have awarded fees to Plaintiffs who have prevailed on some but not all of their claims. Thus, in Bolton v. Murray Envelope Corp., 553 F.2d 881 (5th Cir. 1977), Barnett v. W. T. Grant Co., 518 F.2d 543 (4th Cir. 1975), and Parham v. Southerwestern [sic] Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970), fees were awarded to Plaintiffs who established class-wide discrimination but

failed on their individual claims. And, in Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975), the Court awarded fees when Plaintiff was successful on his individual claim but did not prevail in his class-wide allegations. Similar results have followed when Plaintiff achieved the injunctive relief she sought but was unsuccessful as to her damages claim, Rosenfeld v. Southern Pacific Co., 519 F.2d 527 (9th Cir. 1975), and when Plaintiffs prevailed on seniority rights and sick pay claims but lost on job classification and back-pay issues, Taylor v. Goodyear Tire and Rubber Co., 6 EPD ¶8696.

In sum, the applicable case law clearly demonstrates that Plaintiffs who have furthered the goals of their lawsuit in some significant way are prevailing parties, under the law, and entitled to attorneys' fees and costs. Clearly Plaintiffs, who have significantly and posi-

tively affected employment opportunities for the majority of the persons on whose behalf this action was brought, qualify as a prevailing party under this standard.

I. The Fact That Plaintiffs May Have Settled for Something Less Than They Would Have Achieved, if Successful at Trial, Does Not Affect Their Status as Prevailing Party.

In the exercise of their mandated function of overseeing and approving the settlement of Title VII actions, Courts have consistently noted that conciliation and settlement are the preferred means of resolving lawsuits brought under Title VII. Thus, as the Ninth Circuit stated in Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976):

> "It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense."

This was stated by Judge Orrick, of this district:

> "The proposed settlement should be assessed in light of the principles discussed in the recent Fifth Circuit opinion in United States v. Allegheny Ludlum Industries, Inc., supra. In his thoughtful and thorough opinion, Judge Thornberry outlines the rules of law which govern the review of a settlement, particularly in a Title VII case.
>
> The decision emphatically affirms the principle that 'conciliation and voluntary settlement are the preferred means for resolving employment discrimination disputes'. 517 F.2d 846. Stated another way 'voluntary compliance is preferable to court action and . . . efforts should be made to resolve these employment rights by conciliation both before and after court action."
> Alaniz v. California Processors, Inc., 73 FRD 269, 279 (N.D. Cal. 1976).

Because of the principles favoring conciliation and settlement of employment discrimination disputes and because the very essence of a settlement is a compromise between the positions of the opposing

parties, Courts have never demanded that a settlement agreement provide every possible form of relief which might have been obtained after judgment for the Plaintiffs in contested litigation. Thus, the Seventh Circuit upheld the denial of a motion of the Equal Employment Opportunity Commission to intervene in order to challenge a proposed settlement, stating:

> "Finally, the Commission asserts that the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated. This is precisely the sort of gratuitous opinion that the parties are entitled not to have foisted upon them under the scheme of Title VII. Suffice it to say that as a general proposition the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation. This is especially true within the confines of Title VII where 'there is great emphasis * * * on private settlement and the elimination of unfair practices without litigation'. [citation omitted]"
> Air Lines Stewards and Stewardessess Association, Local 550

v. American Airlines, Inc., 455 F.2d 101, 109 (7th Cir. 1972).

Similarly, the Fifth Circuit noted:

> "Neither should it be forgotten that compromise is the essence of a settlement. The trial court should not make a proponent of a proposed settlement 'justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained; inherent in compromise is a yielding of absolutes and an abandoning of highest hopes'. [citations omitted]"
> Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).

See also, Boye v. Bechtel, 20 FEP Cases 944 (N.D. Cal. 1979) and Alaniz v. California Processors, Inc., 73 FRD at 278.

As shown above, Plaintiffs have achieved most of the relief they would have hoped to have achieved at trial had they prevailed on the major issues in this case. That Plaintiffs have given up the presumption in favor of class member claimants that they would have enjoyed at

a Stage II claims procedure after prevailing at trial, does not appear an unreasonable concession when compared with the benefits obtained through settlement now, rather than by victory after trial, and possible appeal, sometime in the future.